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IN THE

Supreme Court of the United States

OCTOBER TERM, 1946

No. 712.

IN THE MATTER

of

ST. CHARLES HOTEL COMPANY,

Alleged Bankrupt.

HARRY CASSMAN, as Receiver of St. Charles Hotel Company, appointed by the Chancery Court of the State of New Jersey,

Petitioner,

against

ABRAHAM KURZROCK, KATIE BOSSHARD, and MURIEL J. BRYER, as Petitioning Creditors of an involuntary petition in bankruptcy filed against St. Charles Hotel Company,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT AND BRIEF IN SUPPORT OF PETITION

SAMUEL MILES FINK,
Attorney for Petitioner.

CHARLES GOTTLIEB,
of Counsel.

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PETITION FOR WRIT OF CERTIORARI

TO THE HONORABLE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Harry Cassman, as Receiver of St. Charles Hotel Company, appointed by the Chancery Court of the State of New Jersey, respectfully prays for a writ of certiorari

to the United States Circuit Court of Appeals for the Third Circuit, to review a decree of that Court entered on the 29th day of August, 1946, which affirmed two orders of the United States District Court for the District of New Jersey, entered on October 27, 1945.

By the first order, an application by Petitioner for leave to intervene in the bankruptcy proceedings and to file an answer to an involuntary petition in bankruptcy was denied (R. 27a). By the second order, the District Court adjudged the Company a bankrupt (R. 28a).

Opinions Below

Neither the opinion herein of the United States District Court for the District of New Jersey, nor the opinion of the Circuit Court of Appeals for the Third Circuit has yet been reported.

Summary and Statement of the Matter Involved

The St. Charles Hotel Company, alleged bankrupt above-named, is a New Jersey corporation, and is the owner of the St. Charles Hotel in Atlantic City, New Jersey. As of May 1, 1925 it authorized the issuance and sale of $3,000,000 principal amount of first mortgage bonds, of which $2,228,000 were issued to the investing public throughout the United States. The bonds are secured by a first mortgage upon the hotel, its furniture, furnishings and equipment.

For an understanding of the matter here involved, it is necessary to dwell briefly on the principal facts of three interrelated streams of litigation to which the Company was a party.

On November 29, 1944 Frank K. Vidler, and other owners of first mortgage bonds in the principal amount of

$50,000, jointly filed a bill in the Chancery Court of New Jersey praying for the appointment of a Receiver for the Company. That relief was sought on the grounds of its insolvency (General Corporation Law of New Jersey, Title 14, Chap. 14 of the Rev. Stat. of New Jersey, 1937, N. J. S. A. 14:14), and the fraudulent leasing of the St. Charles Hotel to a certain Kabor Co.

Upon filing the bill, the plaintiffs obtained a rule to show cause, returnable December 12, 1944, why a receiver should not be appointed. Before the return date of the rule, the Company filed a voluntary petition in the United States District Court for the District of New Jersey for reorganization under Chapter X of the Bankruptcy Act. On the same day, the District Judge approved the petition as properly filed, and appointed one Aaron Smith as a Chapter X Trustee for the Company and its assets.

Vidler and Hurwith, another complainant in the State Chancery Court action, filed answers to the petition for reorganization and moved for its dismissal. The District Court sustained the objections, and on March 26, 1945, an order was entered dismissing the voluntary petition (Reported at 60 F. Supp. 322).

The next day, March 27, 1945, one Edward S. Ladin, the owner of a single $500 first mortgage bond moved for leave to intervene in the Chapter X proceedings, for a rehearing of the issues raised by the answers to the voluntary petition, and to vacate the order of dismissal of March 26, 1945.

While Ladin's application was pending, and on April 4, 1945, the Chancery Court of New Jersey acted upon the application of the complainants in its Court, and appointed Harry Cassman, present Petitioner, as Receiver of the assets and property of the Company. Thereafter Cassman qualified as such Receiver. (The sole act of bankruptcy alleged in the subsequently-filed involuntary

petition in bankruptcy was this appointment of Petitioner as Receiver.)

Because Ladin's application for rehearing was pending in the Federal District Court, sitting as a Reorganization Court, the Company's assets were not then turned over by Aaron Smith, the Chapter X Trustee, to Cassman, as State Court Receiver. In fact, because of the ensuing developments, to be hereinafter recited, they were never surrendered by Smith to Cassman. Smith continued to administer them as Trustee until his appointment as Custodial Receiver in bankruptcy on November 1, 1945 (R. 29a-32a).

On April 30, 1945, the District Court made an order denying the Ladin application. On the same day, the District Court made an order directing Aaron Smith, the Chapter X Trustee, to return the assets to the Company, or to such other person as would be authorized by any court of competent jurisdiction to receive the same.

On May 1, 1945, Ladin served notice that he was appealing to the Circuit Court of Appeals, Third Circuit, from the orders of March 26, 1945 (by which the Chapter X petition had first been dismissed) and from the aforesaid two orders of April 30, 1945.

Two days before the formal notice of appeal was filed, i. e., on April 28, 1945, Ladin obtained from Circuit Judge Biggs a rule to show cause why Aaron Smith, the Trustee, should not be stayed from transferring or conveying to the Company, or to Cassman as Receiver, any of the Company's property. The order contained an *ex parte* temporary stay. On May 18, 1945, that rule was made permanent.

On June 13, 1945, the Third Circuit Court confirmed the District Court's orders of March 26, 1945 and April 30, 1945 (Reported at 149 F. 2d 645).

On June 14, 1945, Ladin filed with the Clerk of the Circuit Court notice of his intention to apply to the Supreme Court of the United States for a writ of certiorari.

Under Rule 38 of the Rules of the Third Circuit Court the Clerk of that Court was stayed by the filing of that notice from issuing his mandate to the District Court until this Court had acted on the application for the writ.

On July 2, 1945, while Ladin's application to this Court was pending, three mortgage bondholders, the Respondents herein, filed an involuntary petition in bankruptcy against the Company in the United States District Court for the District of New Jersey. In that petition the sole act of bankruptcy alleged was the appointment of Cassman, your Petitioner, as Receiver (R. 1a-5a).

On July 17, 1945, Petitioner herein petitioned for leave to intervene in the involuntary bankruptcy proceedings and to file an answer to the petition (R. 6a-12a). A proposed answer was annexed to the moving papers (R. 13a-19a). It contained two affirmative defenses to the bankruptcy petition. The first was that as the Company and its property were already under the jurisdiction of, and being administered by, the District Court sitting as a Reorganization Court, it was improper and illegal for other creditors to file a petition in involuntary bankruptcy to secure jurisdiction to the same District Court, sitting as a Bankruptcy Court, over the same person, and to administer the same assets. The second plea was that the date of appointment of Petitioner as Receiver should not be construed so as to fall within the four month period before the filing of the petition, even though upon a literal calculation it did so occur, because the appointment of petitioner as Chancery Court Receiver on April 4, 1945, had been delayed and avoided beyond December 12, 1944 (the return date of the rule to show cause in the Chancery

Court) by the entry in the Chapter X proceedings of an improvident order by the District Court on December 8, 1944, enjoining the appointment of a Receiver by the Chancery Court.

Argument of Petitioner's application for leave to intervene and answer in the involuntary proceedings was postponed until this Court would act on the Ladin application for a writ.

On October 15, 1945 this Court denied the Ladin application for a writ of certiorari (*Ladin* v. *Hurwith*, 326 U. S. 738). Thereupon Petitioner's application for leave to intervene and to interpose an answer to the involuntary petition was argued in the District Court. As heretofore recited, that Court denied the application, and adjudicated the Debtor a bankrupt, by the two orders entered on October 27, 1945. These are the orders whose review by this Court is sought.

On appeal to the Circuit Court, Petitioner stood only on the sufficiency of the first proposed defense contained in his proposed answer.

Jurisdictional Statement

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925 (28 U. S. C., Sec. 347) and Section 24(c) of the Bankruptcy Act.

Questions Presented

The questions to be presented are in effect different facets of a single problem in jurisdiction.

Does a United States District Court, sitting as a Court of Bankruptcy, have jurisdiction to entertain an involun-

tary petition in bankruptcy at a time when the same Court, sitting as a Court of Reorganization, is still exercising jurisdiction over the same debtor and its assets in reorganization proceedings?

Is jurisdiction of a District Court over a debtor and its assets so finally and conclusively terminated by the entry of an order of dismissal of a Chapter X petition as to permit the filing of an involuntary petition in bankruptcy in the same Court, and against the same debtor, when an appeal is taken from the order of dismissal, and a stay of proceedings is granted pending appeal, as a result whereof the District Court continues actual jurisdiction over the debtor's assets, through the actual possession, management and supervision of the debtor's property by its Chapter X trustee? Under such circumstances, is not the jurisdiction of the District Court under the Chapter X proceeding a continuing one until a final disposition of all appeals from the order of dismissal?

Is not a plea that the second petition (the involuntary petition in bankruptcy) abates because of the lack of finality of the dismissal of the first petition (the Chapter X petition), a valid and sufficient defense to the involuntary petition?

Reasons Relied On for Granting the Writ

1. The decisions of the Circuit Court of Appeals for the Third Circuit and of the District Court of New Jersey in the instant case deal with a fundamental rule of bankruptcy jurisdiction not covered by any provision in the Bankruptcy Act, nor in the General Orders in Bankruptcy adopted by the Supreme Court of the United States. The decision herein of the Circuit Court of Appeals so concedes (First sentence, R. 45.) Nor has the question ever been before the Supreme Court. The Courts below laid down the rule that the same Federal District

Court may exercise jurisdiction over a debtor and its assets simultaneously under a Chapter X Bankruptcy petition and under an involuntary petition in bankruptcy. This the District Court sought to do at a time when it had not yet concluded its jurisdiction over the Debtor and its assets in the reorganization proceedings, because the pendency of appeals from orders dismissing the Chapter X petition, and the issuance of a stay by the Appellate Court, left the Reorganization Court in actual and active possession and management of the Debtor's assets and business. This novel doctrine, that a single District Court may simultaneously take two-fold jurisdiction under the Bankruptcy Act of the same parties, *i. e.*, debtor and creditors, and of the same assets of the debtor, warrants examination, review and definitive settlement by this Court.

2. The decision of the Circuit Court of Appeals for the Third Circuit in the present case is in conflict with the holding by the Circuit Court of Appeals for the Tenth Circuit in *Humphrey* v. *Bankers Mtg. Co. of Topeka, Kansas,* 79 F. 2d 345. That holding was that once a District Court had acquired jurisdiction of a debtor corporation and its assets pursuant to a petition under Chapter X of the Bankruptcy Act, it had exhausted its capacity for bankruptcy jurisdiction. It could not then entertain a second Chapter X petition. The rationale in the instant decision is directly to the contrary. The conflict should be resolved by the Supreme Court.

3. This Court has never had occasion to consider a well-established phase of the principles of abatement as applied to a bankruptcy involuntary petition filed when an appeal is pending from an order dismissing a Chapter X petition, and when, pending appeal, the District Court continues in actual possession, and active supervision and management of the debtor's assets.

Prayer for Writ

WHEREFORE, your petitioner prays that a Writ of Certiorari be issued under seal of this Court, directed to the United States Circuit Court of Appeals for the Third Circuit to the end that this cause may be reviewed and determined by this Court; that the decree of the Circuit Court of Appeals for the Third Circuit be reversed; and that petitioner be granted such other and further relief as may be just and proper.

Dated: New York, New York, November 20, 1946.

SAMUEL MILES FINK,
Counsel for Petitioner.

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BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I. Opinions Below

Neither the opinion herein of the United States District Court for the District of New Jersey, nor the opinion of the Circuit Court of Appeals for the Third Circuit, has yet been reported.

II. Jurisdiction

The basis for jurisdiction has been set out at page 6 of the petition herein.

III. Statement of the Case

A statement of the matters involved in this case has been set out at pages 2 to 6 of the petition herein.

IV. Specification of Errors

The Circuit Court of Appeals for the Third Circuit erred:

1. In holding that after the District Court had entered an order dismissing the Chapter X proceedings, it could entertain a petition in involuntary bankruptcy, although when the latter petition was filed the District Court continued in actual supervision and jurisdiction of the debtor and its assets by virtue of a stay pending appeal.

2. In failing to hold that while the District Court was still exercising supervision and jurisdiction over the debtor and its assets pursuant to the petition under Chapter X of the Bankruptcy Act, it had so exhausted its bankruptcy jurisdictional capacity as to preclude it from entertaining an involuntary petition in bankruptcy.

3. In failing to reverse the orders of the District Court for New Jersey, entered on October 27, 1945, whereby Petitioner's application for leave to intervene in the Bankruptcy proceedings, and to interpose an answer to the involuntary petition was denied, and whereby the debtor was adjudicated a bankrupt.

V. Summary of Argument

The points of argument will follow the reasons relied upon for the Writ of Certiorari, and will be discussed in the order stated in the petition.

VI. ARGUMENT

POINT I.

A federal District Court cannot simultaneously exercise jurisdiction over a debtor and its assets under a Chapter X petition and an involuntary petition in bankruptcy.

In the instant case, if a petition in involuntary bankruptcy was not properly filed on July 2, 1945, the appointment of Petitioner as Receiver in Chancery on April 4, 1945, was not an act of bankruptcy occurring within four months prior to the filing of a proper petition.

On December 8, 1944, the District Court of New Jersey approved the voluntary petition under Chapter X of the Bankruptcy Act for reorganization filed with it by the Debtor Company. It thereby acquired exclusive jurisdiction over the Debtor and its property. (Sec. 111 Bankruptcy Act, 11 U. S. C. Sec. 511). It appointed Aaron Smith its trustee, to represent it in that exclusive jurisdiction and administration. The legal consequences which follow such a step are well known, but need specific restatement here.

> "When a court exercising jurisdiction in equity appoints a receiver of all the property of a corporation, the court assumes the administration of the estate; the possession of the receiver is the possession of the court; and the court itself holds and administers the estate, through the receiver as its officer, for the benefit of those whom the court shall ultimately adjudge to be entitled to it."
>
> *Porter* v. *Sabin*, 149 U. S. 473, 479.

It is true that on March 27, 1945 and on April 30, 1945 the District Court, by its orders dismissing the petition

for reorganization sought to divest itself of jurisdiction over the person and property of the Debtor. But it was thwarted in that attempt by the appellate proceedings which ensued. Ladin, as appellant, caused the Circuit Court of Appeals for the Third Circuit, to stay Aaron Smith pending appeal to that court, from turning back the assets to the Debtor Company or to Petitioner herein, as Chancery Receiver. That stay was continued even after the affirmance by the Third Circuit Court of Appeals on June 13, 1945. For, on June 14, 1945, Ladin filed with the Clerk of the Circuit Court notice of intention to apply for a writ of certiorari. And on July 28, 1945, he filed with the Clerk of the same Court a certificate from the Clerk of the Supreme Court that he had filed his application for a writ of certiorari. As a result of the steps thus taken by Ladin, the Clerk of the Circuit Court could not return his mandate to the District Court (Subd. 2, Rule 38 of the Rules of the Circuit Court of Appeals for the Third Circuit).[1] Since the mandate could not be returned, the stay continued in effect pending determination by this Court of the application for a writ.

> "If aplication be promptly made to the Circuit Court of Appeals and granted, to withhold its mandate pend-

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[1]Subdivision 2 of Rule 38, reads:

> "CERTIORARI TO SUPREME COURT—DURATION OF STAY. In any case where a stay of the mandate is applied for on the ground that it is desired to make application to the Supreme Court of the United States for a writ of certiorari, such stay will be made for a further period of 30 days, and if within the said period of 30 days, there shall be filed with the clerk of this court, a certificate from the clerk of the Supreme Court to the effect that there has been filed in that court the certiorari petition, record and brief, and proof of notice thereof as required by the Supreme Court, the stay of the mandate of this court shall continue until final disposition of the case by the Supreme Court. Immediately upon the filing in this court of a copy of an order by the Supreme Court denying the writ applied for, the mandate of this court shall be issued."

ing certiorari, the case will be held in suspense as it came to that court until the certiorari is disposed of. This is the simpler and better practice, and petition for certiorari may thus be presented."

Cyclopedia of Federal Procedure, 2nd Ed. Sec. 5901, Vol. 11, p. 524.

"If a supersedeas has been obtained, the execution of the judgment or decree is stayed until the determination of the appeal and return of the mandate."

Cyclopedia of Federal Procedure, 2nd Ed. Sec. 6390, Vol. 12, p. 623.

On October 15, 1945, this Court denied Ladin's application for a writ of certiorari. Then for the first time was Aaron Smith free to relinquish the Debtor's assets. He did not actually do so until November 1, 1945 when he turned them over to himself as custodial receiver appointed by the bankruptcy court (R. 29a).

Because of the happenings just recited, the jurisdiction of the District Court over the Debtor and its assets did not actually terminate when, on March 26, 1945 and April 30, 1945, it entered its orders dismissing the Chapter X petition. Despite those orders, the Debtor and its Creditors actually remained subject to the jurisdiction of the District Court, sitting as a Reorganization Court, until November 1, 1945. The assets were in custodia legis of the same Court throughout that period. The parties and assets were therefore in that status on July 2, 1945, when the involuntary petition in bankruptcy was filed herein.

Under such circumstances, and as a matter of first impression, it would seem impossible for a Court to attempt a second jurisdiction over that which was already within its jurisdiction. Or, to phrase the thought otherwise,—it would seem that on July 2, 1945 the District Court was so

exhausting its jurisdiction over the parties and the assets, by continuing administration and management under Chapter X of the Bankruptcy Act, as to leave no capacity for further jurisdiction over the same parties and subject matter under other provisions of the Act.

The Circuit Court, however, ruled to the contrary on the grounds that the orders dismissing the Chapter X petition were "final"; that this resulted in a relinquishment of jurisdiction by the District Court; and that the jurisdiction was not "revested" by the subsequent stay order granted on appeal (Opinion, R. p. 45 bottom to p. 46 top).

We admit the orders were "final", and, as thus viewed, come within the well-settled principle that a judgment is deemed final and decisive until reversed for certain legal consequences. That is the proposition for which the cases cited by the Circuit Court in footnote "8" of its decision (R. 46) are authority. Thus, in the cited case of *Lincoln Mine Operating Co.* v. *Huron Holding Corp.*, 111 F. 2d 438, 439, rev'd on other grounds 312 U. S. 183 (1941), the judgment was said to be final, despite appeal and supersedeas, in consequence whereof it was a proper subject for levy under warrant of attachment. Another common example of the legal consequences which follow the concept of finality of judgment, is the rule that the judgment being final, it is *res adjudicata* of the issues settled by it, despite appeal and stay.

However, none of the cases cited by the Circuit Court are authority for the conclusion it reached in the instant case, *i. e.*, that as a legal consequence of the finality of the orders dismissing the Chapter X petition, the District Court relinquished jurisdiction. (We make this application for a writ precisely because there is a complete lack of authority on this point.) It cannot be said that relinquishment was a consequence in law, since it was not a conse-

quence in fact. As indicated above, the appeal to the Circuit Court, and then the application for a writ of certiorari to this Court, coupled with the stay order, actually left the District Court, with supervisory control over the Debtor and its creditors and, acting through Smith, its trustee, in possession and active administration of management of the Debtor's assets. It cannot be gainsaid that when a court is exercising such powers it is exercising jurisdiction. To hold otherwise in the instant case would be to ignore the plain facts and to invent an imaginary hiatus when no one had jurisdiction between the dates of the orders of dismissal and the date when this Court denied the application for a writ.

When the situation is thus viewed realistically, a ready answer is available to the Circuit Court's dictum that the stay order did not have the collateral effect of revesting the District Court with jurisdiction it had renounced (Opinion R. 46). We never contended the stay order had such effect and we cheerfully grant that it did not. It was unnecessary for the stay order to serve such purpose because there was no requirement that the District Court be revested with jurisdiction by the stay order or in any other manner. That, because there had never been a divestment of jurisdiction. Only if one first sets up the fiction that there had been divestment, does it become necessary to find a revestment.

Courts are not slow to refuse to attach legal consequences to a "final judgment" which flies in the face of common sense and fact. *General Acc. Fire & Life Assur. Corporation* v. *Clark,* 34 F. 2d 833, C. C. A. 9th Cir. The first question there considered was whether judgment creditors could recover in a Federal Court from an insurance carrier the full amount of a judgment obtained in a lower State Court, on the ground that the latter was a "final judgment", although before argument in the Circuit Court of Appeals the State Appellate Court had reduced the original judgment. The Circuit Court of Appeals for the

Ninth Circuit refused to affirm for the larger amount, writing:

> "There is no doubt that the judgment of the Superior Court in a damage case is a 'final judgment' in a technical sense, and it is so designated by the statutes of Arizona concerning appeals. Section 1228, Civ. Code, Ariz. 1913. This is true, whether or not an appeal is taken, and whether or not a stay bond is given. It is thus designated, to distinguish it from an interlocutory decree or order. It is quite clear that it is not 'final', in the sense of concluding the litigation, or finally establishing the rights of the parties, where an appeal is pending."

Finding as we do continued jurisdiction under Chapter X of the Bankruptcy Act in the District Court on July 2, 1945, we maintain that on that day it could not undertake additional jurisdiction under other provisions of the Bankruptcy Act. It could not act as a reorganization court and as a Bankruptcy Court at one and the same time. Its capacity for bankruptcy jurisdiction was exhausted. For that proposition, we rely on the suggestive reasoning of

> *Humphrey* v. *Bankers Mtge. Co. of Topeka, Kansas,* 79 F. 2d 345, Circuit Court of Appeals, Tenth Circuit, decided August 7, 1935.

In that case two petitions for reorganization were successively filed in the same District Court. Discussing the jurisdictional capacity of the lower Court as a court of bankruptcy, to entertain two petitions simultaneously, the Circuit Court wrote:

> "An order approving a petition effectually subjects the debtor to the jurisdiction of the court and places its property wherever situated in exclusive custodia legis from and after that time. In re Fox Metropolitan Playhouses (C. C. A.), 74 F. (2d) 722; In re 211 East Delaware Place Bldg. Corporation (C. C. A.) 76

F. (2d) 834. It has the same consequences with respect to subjecting the debtor and its property to the jurisdiction of the court for the purposes of administration in accordance with the terms of the statute that an adjudication has in an ordinary bankruptcy proceeding" (p. 349).

* * * * *

"Turning now to the orders made in the voluntary proceeding directing Campbell to deliver the property of the debtor to Allen as trustee, they were erroneously entered because the order approving the petition in the proceeding was entered without jurisdiction. *We deal with two proceedings, but only one court. It had jurisdiction of the subject-matter, but that jurisdiction had been exercised by the approval of the involuntary petition almost two hours previously. By that action jurisdiction attached to the debtor and its property was in custodia legis. It was exhaustive and exclusive of subsequent action identical in nature. It could not be exercised by repetition. There remained no unexhausted reservoir of jurisdiction upon which the court could draw in approving the voluntary petition. How could a party already before the court and property already in custodia legis be brought again into that identical status? The question furnishes its own answer*" (p. 352). (Italics briefer's.)

It is true that in the Humphrey case no order dismissing the first petition had been entered when the second petition for reorganization was filed; whereas in the instant case an order of dismissal of the reorganization petition had been entered when the petition in involuntary bankruptcy was filed. That, we submit, is a distinction without a difference so far as the instant question is concerned. For when the involuntary petition was filed herein, the Bankruptcy Court, as a reorganization court, still had, and thereafter continued, jurisdiction over the Debtor and its assets. In both cases the court was already exercising jurisdiction when the attempt was made to duplicate ju-

risdiction. We therefore reiterate its question posed in the decision of the Humphrey case, "How could a party already before the court and property already in custodia legis be brought again into that identical status?"

We submit that there is such conflict in this reasoning by the Tenth Circuit Court of Appeals with the reasoning and conclusion reached by the Third Circuit Court of Appeals in the instant case as to merit the granting of a writ of certiorari.

* * * * *

If the above views are well taken, and the District Court was without power to entertain the involuntary petition on July 2, 1945, then it follows that the appointment of Petitioner as receiver on April 4, 1945, was not an act of bankruptcy within the four month period preceding the filing of a valid petition. At most, creditors could have first filed a valid petition after the denial of the application for a writ of certiorari by the Supreme Court on October 15, 1945. Since Petitioner was appointed receiver on April 4, 1945, that act would not fall within the four month period.

POINT II

The first affirmative defense pleaded in petitioner's proposed answer to the involuntary petition in a bankruptcy is a good and sufficient plea in abatement to that petition.

We develop the basic thought of Point I, *supra,* through application of the more formal and technical rules of pleas in abatement.

Petitioner's application for leave to intervene in the involuntary bankruptcy proceedings, and to file an answer to the petition, was denied on the ground that his proposed answer failed to set up any meritorious defense. It is, however, submitted that the plea contained in the first

affirmative defense (R. 14a to 17a, paragraphs "Sixth" to "Seventeenth" inclusive, of the Proposed Answer) is a good plea in abatement. Such plea is as applicable to bankruptcy proceeding as to any other litigation. All the elements of a situation in abatement were present, i.e., identity of causes of action, issues and parties. The parties were the same,—being the Debtor Company and its creditors; the subject matter was the same,—being the disposition of the Debtor's assets and liabilities; and the relief sought was generally the same, i. e., the determination of the Debtor's status under the Bankruptcy Act.

It was argued by the Respondents below that the rule of abatement was inapplicable since the causes of action were not the same, in that the relief sought by the two proceedings was different. A reorganization proceeding seeks to continue a Debtor in its business, whereas involuntary bankruptcy seeks the Debtor's extinction, by liquidation and distribution of assets. It is, however, unnecessary for a second cause to abate that there be complete and absolute identity between it and a prior proceeding. It is sufficient if there be a *substantial* identity.

> "Identity of Causes, Issues and Parties. The general rules as to identity of causes of action and issues and of parties apply in this connection; and therefore, in order that the pendency of a prior action on appeal or writ of error may be ground for abatement of a second action, it is necessary that there shall be *substantial identity* of causes of action and issues, and of parties. But it is not necessary that the matter involved in the second suit shall have been actually determined in the first suit; it is sufficient if it was within the legitimate purview of the litigation and might and should have been raised and determined therein."
>
> 1 *Corpus Juris* 100, Title *"Abatement and Revival"*, Sec. 146. (Italics, briefer's.)

There is a *substantial* identity between reorganization and involuntary bankruptcy proceeding, and an adjudication may be had if attempts at reorganization are unsuccessful.

> "An order approving a petition (under Sec. 77b) effectually subjects the debtor to the jurisdiction of the court and places its property wherever situated in exclusive custodia legis and after that time. In re Fox Metropolitan Playhouses (C. C. A.), 74 F. (2d) C. A., 76 F. (2d) 834. It has the same consequences with respect to subjecting the debtor and its property to the jurisdiction of the court for the purposes of administration in accordance with the terms of the statute that an adjudication has in an ordinary bankruptcy proceeding. That is apparent from a careful analysis of the various provisions of the section, and it is expressly so provided in the concluding language of paragraph (k). That paragraph further decrees that all other provisions of the title not inconsistent with those contained in the section shall apply to proceedings instituted under it whether or not an order to liquidate the estate has been entered. Paragraph (o) is in harmony. And paragraph (a) does not argue that they are dissimilar in effect. *It suggests, on the contrary, that they are so closely akin in essence and consequence* that approval of the petition suspends the power of adjudication while the proceeding continues to pend. Paragraph (o) is identical in substance with paragraph (n), except that in the latter a jurisdiction attaches from the filing of the petition, while in the former it attaches upon the approval. The appeal in a quite recent case was taken from an order sustaining the petition of a creditor to dismiss the proceeding brought under Section 75 because the debtor was not a farmer, but in passing the court expressed the view that the filing of the petition effected

an implied adjudication which was the equivalent of an adjudication in bankruptcy. Wilkerson v. Cooch (C. C. A. 9), 78 F. (2d) 311. We think an order approving a petition under Section 77b is so nearly a counterpart of an adjudication in an ordinary bankruptcy petition that an appeal from it may be taken under Section 25a of the Act (11 U. S. C. A.), Sec. 48(a)."

Humphrey v. *Bankers Mtge. Co. of Topeka, Kansas,* 79 Fed. (2d) 345, 349-350, 10 Cir., decided August 7, 1935. (Italics, briefer's.)

In the Court below, Respondents argued that the instant situation fell within a rule which holds that dismissal, discontinuance, or other termination of the prior suit, before or after a plea in abatement is filed, defeats the plea. In so arguing, Respondents failed to distinguish between dismissal, discontinuance or other termination of the prior suit, and non-termination because of appeal from the judgment. If there is a dismissal or discontinuance there is a final adjudication of the first action, and jurisdiction of the court over the parties and subject matter is conclusively ended. But no such result follows where an appeal is taken and a stay of judgment is had.

Respondent cited to the Circuit Court extracts from *Corpus Juris Secundum* to support their contention that dismissal or discontinuance before or after the plea is filed serves to defeat it.

"By the weight of authority, however, the prior action cannot be pleaded in abatement of the second, if the discontinuance, dismissal, or other termination thereof occurs before the filing of such plea, although after the commencement of the second action, particularly where the second action is dismissed on the motion of defendant."

1 C. J. S. 110, Title "Abatement and Revival", § 71a.

"In most jurisdictions, however, such a plea will not be sustained if the prior action has been discontinued or dismissed, whether this occurred before or after the commencement of the second action, or before or after the filing of the plea; and accordingly it has been held that the discontinuance, dismissal or other termination is sufficient to defeat such a plea, if it occurs at the time of, or before the trial or hearing on such plea."

1 C. J. S. 111, Title "Abatement and Revival", § 71b.

But a more careful study of that very encyclopedia would have disclosed that along with this rule, and distinguishing it, exists the rule applicable to the facts of this case.

"Where an appeal or writ of error operates as a supersedeas the pendency of a prior action on an appeal or writ of error may be pleaded in abatement of a subsequent action.

Although a judgment in a lower court is final in a technical sense, and may terminate the action so as to prevent its being urged as a ground for abatement (*supra,* §§ 70-72) nevertheless where, because an appeal from the judgment is pending, the judgment may not be final (Appeal and Error § 611 [3 C. J. p. 1261 note 71—p. 1262 note 75]) and such appeal operates as a supersedeas. (Appeal and Error § 626 [3 C. J. p. 1273 note 60]), the pendency on appeal of a prior action is ground for the abatement of a second action between the same parties for the same cause of action."

1 C. J. S. 116, Title "Abatement and Revival", §73.

To the same effect, see 1 *Corpus Juris* 98, § 143, in distinction to §§ 130-133 (pp. 93-95).

Petitioner's plea in abatement was valid and meritorious. Petitioner should therefore have been permitted to intervene and answer.

Conclusion

It is respectfully submitted that the petition for Writ of Certiorari should be granted.

Dated: November 20, 1945.

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